

No. 82-1214

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

LUISSA LERNER,
Petitioner,

VS.

UNITED STATES OF AMERICA,
SAMUEL RILEY PIERCE, Secretary of the
Department of Housing and Urban Development,
HOUSE OF AFFIRMATION, INC., a corporation,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF RESPONDENT HOUSE OF AFFIRMATION, INC. IN OPPOSITION

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QUESTION PRESENTED

On the facts of this case, did petitioner receive adequate notice and opportunity for a hearing under the Fifth Amendment prior to foreclosure on her business property by the Department of Housing and Urban Development?

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**BRIEF OF RESPONDENT
HOUSE OF AFFIRMATION, INC.
IN OPPOSITION**

The respondent, House of Affirmation, Inc., respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the opinion of the Ninth Circuit in this case, reported at 685 F.2d 1182.

STATEMENT OF THE CASE

This action arises out of a trustee's sale of a convalescent hospital held over nine years ago following the failure of the partnership-borrower to make required installment

loan payments on a loan insured by the Federal Housing Administration ("FHA").

On February 2, 1971, Coastside Convalescent Hospital ("Coastside") obtained a loan from Bankers Mortgage Company of California ("Bankers") to fund renovation work on the hospital. The loan was secured by a deed of trust encumbering the property, and repayment of the loan was guaranteed by FHA. Roberts-Pacific, Inc., a general contractor, became a partner in Coastside and itself began performing the desired renovation work.

Petitioner Luisa Lehner, claiming to be either a general partner of Coastside or its successor in interest, alleged below that either under the original loan agreement or pursuant to oral promises made by an employee of FHA, Fred Soviero, FHA owed a contractual duty to petitioner to ensure that the contractor—the petitioner's partner—would complete the work to be done in a proper fashion. Petitioner further alleged that Soviero induced her to execute a Notice of Completion declaring that construction work had been satisfactorily completed on January 18, 1972 (which was not the case) by representing that the Notice of Completion would result in the release to the contractor of additional funds which would be sufficient to pay the contractor to complete the project, including correction of construction defects, and that if petitioner executed the Notice of Completion, FHA would supervise the contractor and require him to complete the project. Petitioner contended that FHA breached this promise.

Petitioner herself had been in difficulty with the California Department of Health for mistreating patients and administering poor nursing care for some time. Medi-Cal

suspended Coastside from patient care benefits on October 16, 1972. As early as March, 1973, the loan was overdue, and the delinquent amount rose to over \$40,000 by July, 1973. In August, 1973, a ninety-two page judgment was filed against Coastside for defects and noncompliance with the California Health Code, resulting in a state court order that the building be evacuated and the hospital closed.

Following Coastside's default on the loan, FHA compensated Bankers for its loss, and the beneficial interest on the deed of trust was then assigned to the Secretary of the Department of Housing and Urban Development ("HUD"). On October 4, 1973, the California Department of Health informed HUD that petitioner had been decertified and never would be recertified as a convalescent hospital operator. Finally, on February 5, 1974, the contractor refused to continue work on the project, citing a broken hot water line and the lack of heating in the building.

During 1973 and the bulk of 1974, HUD refrained from foreclosing on the property. Petitioner participated in meetings on a number of occasions with various representatives of FHA and HUD, sometimes represented by counsel, during which she explained her problems and her claims concerning Soviero and sought reinstatement of the loan. She had full knowledge of the impending foreclosure proceedings during this period, and a full opportunity to present her claims during these meetings.

These contacts included the following:¹

¹A factual dispute exists among the parties as to when the foreclosure sale occurred. Respondents contend the sale occurred on November 15, 1974, and the listing of meetings above assumes the

1. A telephone conversation in December, 1973, between petitioner and one Jerplen Keys with a representative of the HUD loan management division in Washington, D.C., believed to be Anthony de Julio, during which the parties discussed construction defects in the hospital, the possibility of foreclosure, and a plan under which the property would be returned to petitioner, who would lease it to Ms. Keys.

2. A subsequent meeting or conversation with Mr. Benson of the FHA Regional Office in San Francisco, California, during which construction defects and problems with the loan were further discussed.

3. A meeting in August, 1974, between petitioner, her attorney and Mr. Benson and Mr. Ohler of the FHA Regional Counsel's Office, during which petitioner's claims in the matter, the construction defects, and petitioner's proposal for a settlement of the matter were all discussed.

validity of this date. Petitioner contends that the sale occurred in September, 1976. Court of Appeals Opinion, Appendix A to Petition, at A-4. Assuming *petitioner's* claim to be accurate, the following additional contacts occurred before the sale:

8. A letter sent by petitioner on July 25, 1975 to Mr. Smith, Regional Inspector General at HUD, requesting reinstatement.

9. A letter sent by petitioner's attorney on September 18, 1976 to Mr. Harman, of the Regional Administration for Housing Management requesting a continuation of the sale, and discussing the conduct of Soviero.

10. The filing of this action in the district court to enjoin the sale on September 21, 1976.

11. An application to the district court for a temporary restraining order against the sale, made and denied on September 21, 1976.

Further, petitioner contends that she had other contacts with FHA and HUD, which she cannot recall, but that these defendants should have records of the "many letters, phone calls, meetings and negotiations." Petition, page 10.

4. A meeting with Mr. Benson of HUD on August 29, 1974, requesting him to "stop foreclosure".

5. A discussion with Mr. Lipolf of the Loan Management Branch of HUD on September 4, 1974, concerning the delinquency in the loan, and possible reinstatement.

6. A conversation between petitioner's attorney and FHA representatives on September 25, 1974, during which her attorney requested a delay of foreclosure proceedings.

7. Receipt of a letter from HUD on October 9, 1974, stating that the foreclosure sale would proceed on the scheduled date and would not be postponed.

After a delay of over a year, during which the hospital had been vacant by court order, a trustee's sale was finally held under the deed of trust on November 15, 1974. As of that time, the default on the loan had reached over \$70,000. HUD purchased the property.

HUD then conducted an extensive appraisal of the property and determined that as of June, 1975, the fair market value of the property was only \$208,000; the property had deteriorated during its abandonment. Subsequently, HUD decided to sell the property and published notice of the pending resale on a nationwide basis, eventually offering the property for sale on August 25, 1976 in "as-is" condition.

On September 21, 1976, HUD entered into a contract with respondent House of Affirmation, Inc., a non-profit, charitable organization ("House of Affirmation"), by which House of Affirmation agreed to purchase the property for the sum of \$165,000, the highest price offered. House of Affirmation consummated the contract, and rehabilitated and occupied the property.

On the same day, September 21, 1976, petitioner filed her original complaint in this action against a variety of federal officials and employees. House of Affirmation was named as a defendant for the first time in the Amended Complaint, filed on March 17, 1978. Defendants' eventual motions to dismiss the Amended Complaint and then the Second Amended Complaint were granted.

On May 16, 1979, petitioner filed her Amendment to the Second Amended Complaint—her fourth pleading in the action. Defendants' motions to dismiss were granted as to its first eight causes of action.² Ultimately, defendants moved for summary judgment on the last two causes of action, which was granted by the district court on March 28, 1980.

Petitioner did not raise the claim at the trial level that use of the statutory procedure provided under California law for nonjudicial foreclosure violated the Fifth Amendment. Rather, at all times petitioner's claim was that the specific procedures followed in this case by HUD concerning the foreclosure—*whatever their source*—failed to comply with the requirements of due process. In fact, in the district court petitioner took the position that the foreclosure should be invalidated for the reason that it did *not* comply with the statutory requirements set forth for nonjudicial foreclosure under California law.

²Petitioner sought relief below against House of Affirmation based upon her Fifth Amendment claims in both the Eighth Cause of Action (dismissed on the motion to dismiss) and the Tenth Cause of Action (dismissed following summary judgment), which incorporated those allegations, and sought to quiet title to the property.

Similarly, on appeal before the Court of Appeals for the Ninth Circuit, petitioner did not raise the issue of the constitutionality of use of the California statute, arguing rather that the specific procedures used were improper.⁸ The Ninth Circuit affirmed the judgment of the district court, finding that the procedures employed by HUD, based on the facts of this case, did comply with due process. The Ninth Circuit did not examine whether use of the California nonjudicial foreclosure statute was constitutional, properly noting that:

Because Lehner does not dispute that the procedure prescribed by California law provides minimal due process, we need not evaluate its constitutionality.

REASONS FOR DENYING THE WRIT

1. Neither the Decision Below Nor the Record Raises the Question Presented in the Petition

The sole question presented in the petition is whether the use of the statutory procedures governing nonjudicial foreclosure under California law violates the Fifth Amendment, where the federal government is a mortgagee. But the Ninth Circuit did not decide this question in this proceeding, nor was it raised before the district court.

As noted above, petitioner's claim in each of her four pleadings before the district court was that the specific procedures followed by HUD in the foreclosure—whatever their source—violated due process in that she was denied

⁸Significantly, the California statutes concerning nonjudicial foreclosure, Civil Code sections 2924, *et seq.* were not even cited—much less analyzed—in the sections of petitioner's opening or reply briefs dealing with the Fifth Amendment claim. The only citation to these statutes occurred in the sections where petitioner argued that the foreclosure procedures *violated* those statutes.

adequate notice and an opportunity for a hearing.⁴ Her pleadings thus raised the issue of due process *as applied* to the facts of this particular case. Petitioner has never claimed that HUD used the procedures created by the California nonjudicial foreclosure statutes. In fact, her claim before the district court and Ninth Circuit was that HUD had *not* followed those procedures. At no time before the district court did petitioner raise the question which she presents to this Court—whether use of the California nonjudicial foreclosure statutes is constitutional.⁵

Similarly, in her briefs before the Court of Appeals for the Ninth Circuit, petitioner argued that—based upon the facts of this case—she had been denied adequate notice and a hearing. Her briefs did not even cite any of the California statutes dealing with nonjudicial foreclosure, Civil Code Sections 2924 *et seq.*, much less raise the issue that their use was unconstitutional. Accordingly, the Ninth

⁴The *only* pleadings raising the Fifth Amendment issue are quoted in the Petition at pages 6-7. The language of the original complaint at page 6 was continued in the Amended Complaint and Second Amended Complaint. The claim was slightly reworded in the Amendment to the Second Amended Complaint, quoted at pages 6-7.

Although admitting that she was represented by counsel in at least some of her dealings with FHA and HUD before the trustee's sale, petitioner also alleged below that she was deprived of a right to counsel in the process. This claim was not raised before the Ninth Circuit, however.

⁵The record below reflects substantial disagreement as to what procedures were used. Petitioner contended that the California statutes were not followed. It is undisputed, however, that petitioner had many meetings and conversations with government representatives concerning foreclosure which are not mandated by these statutes, as discussed in the Statement of the Case. This is thus not a case in which only the statutory procedures were followed (if at all), and does not present a proper vehicle for a Supreme Court analysis of the California system.

Circuit did not examine whether these statutes are constitutional, and noted this fact in its opinion.

2. A Ruling on the Question Presented in the Petition Would Not Change the Result Below

Even assuming *arguendo* that the question presented in the petition was considered indirectly below, a ruling on that question would not change the result below.

The question the petition presents is whether use of the California nonjudicial foreclosure statutes by the federal government violates due process. By definition, nonjudicial foreclosure is a procedure which does *not* require a hearing, in contrast with judicial foreclosure. Thus, alternatively viewed, petitioner's argument boils down to a claim that due process requires a hearing before the federal government may foreclose.

But the Ninth Circuit opinion effectively *agrees* with this position:

When the Government acts as mortgagee, clearly the mortgagor has a right to notice and a hearing prior to the sale. (Court of Appeals Opinion, Appendix A to Petition at A-11)

A determination by this Court that due process mandates notice and a hearing would thus be an empty echo of the Ninth Circuit decision. It would serve no useful end.

The issue before the Ninth Circuit was not whether notice and a hearing are required by due process in the abstract. Rather, the issue was whether the notice and hearing which petitioner did receive in fact met due process standards. This issue—which petitioner has not raised here—was correctly decided.

3. The Action Was Correctly Decided by the Ninth Circuit

The only due process question which petitioner could raise before this Court is whether, in fact, she was accorded adequate notice and an opportunity for hearing. The Ninth Circuit properly determined that the procedures used by HUD met the requirements of due process.

A. Notice

The opinion of the Ninth Circuit examines plaintiff's actual knowledge of the impending sale for over a year in advance, and the many meetings and conversations among governmental officials, petitioner and her attorney. It concludes that she in fact received notice which apprised her fully of the foreclosure sale and the options available to her, even if not necessarily in writing.

This finding comports with the basic purpose of due process—to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Mullane v. Central Hanover Bank and Trust Company*, 339 U.S. 306 (1950). This result similarly reflects the holdings of this Court that the kind of notice which is required by due process will vary with circumstances and conditions, and cannot be limited by any rigid formula. *Walker v. City of Hutchinson*, 352 U.S. 112, 115 (1956); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

B. Hearing

The Constitution requires that a debtor have an opportunity for a hearing in a “meaningful time and in a meaningful manner” in order to meet the requirements of due process. *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971). Due process allows variances in the form of the hearing which is appropriate to the nature of the case involved,

depending on the importance of the interests involved. *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Mathews v. Eldridge*, 424 U.S. 319, 334-335 (1976).

In *Kremer v. Chemical Construction Corp.*, 102 S.Ct. 1883, 1898 (1982), one of the most recent opinions examining the same issue, this Court reiterated the rule that no single model of procedural fairness, let alone a particular form of procedure, is dictated by the due process clause:

The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.

Here, petitioner had a fully adequate hearing. Represented by counsel, she participated in a series of informal hearings with government representatives over a period of at least eleven months prior to the foreclosure sale, described in detail above in the Statement of the Case. Before the district court and the Ninth Circuit, respondents successfully contended that these many conferences constituted a sufficient hearing under the flexible standards of due process.

4. The Narrow, Highly Factual Issue in This Action Does Not Merit Examination by This Court

This action does not present a significant constitutional question whose decision would resolve a conflict in decisions among the circuits or in which there is substantial national interest. Rather, the only narrow issue which could be considered by the Court would be whether the trial court acted within its discretion following motions to dismiss and for summary judgment in concluding that the procedures followed by HUD complied with due process on the facts of this case. This highly factual determination can have little bearing on future litigants or on the public as a whole.

There is no substantial conflict among the opinions of various circuits as to how the Fifth Amendment should be applied to foreclosure proceedings when the federal government is a mortgagee. Each has recognized the fundamental precept laid down by this Court that due process contemplates flexible procedures, attuned to the nature of the particular case involved. *Morrissey v. Brewer, supra*; *Kremer v. Chemical Construction Corp., supra*.

Thus, for example, in *Hoffman v. Department of Housing and Urban Development*, 519 F.2d 1160 (5th Cir. 1975), the Court assumed that due process would require allowing the homeowners there an opportunity to be heard before foreclosure, but found that they had been allowed all the due process proper under the circumstances, since they had been offered an opportunity to explain their failure to make required payments, but had not accepted the opportunity. Similarly, *Fitzgerald v. Cleland*, 498 F.Supp. 341 (D.Me. 1980) found that the plaintiff there—a Lieutenant Colonel in the National Guard who had substantial experience in real estate—had received sufficient opportunity for a hearing based upon his contacts with the Veterans' Administration and the bank involved, recognizing that the requirements of due process vary depending upon the circumstances of each case. The other decisions in the area, dealing with elderly and highly unsophisticated parties who generally had not received any notice prior to the foreclosure sale, have accordingly imposed more significant hearing requirements based upon the facts of those individual cases. See *United States v. White*, 429 F.Supp. 1245 (N.D. Miss. 1977); *United States v. Ricker*, 417 F.Supp. 133 (D. Me. 1976).

These decisions reflect the fundamental rule that the requirements of due process vary depending upon the circumstances of each case. Here petitioner is a businesswoman, who was represented by counsel during efforts to avoid foreclosure over a period of a year prior to the sale, and who participated in a number of meetings and discussions with federal government employees during which she and her attorney explained her problems. The decision of the Ninth Circuit that she was afforded sufficient due process on these facts falls well within the parameters for hearing requirements suggested by other circuits.

The lack of any significant conflict among the circuits and the narrow scope of the factual issues involved here combine to create a question of interest only to the litigants in this action.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Dated: February 18, 1983.

Respectfully submitted,

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